Natsteel Holdings Pte Ltd v Menteri Kewangan & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–94–02 OF 2020
AHMAD KAMAL J
6 OCTOBER 2022

Administrative Law — Judicial review — Application for — Judicial review against decision of Minister of Finance imposing anti-dumping duties at the rate of 4.97% — Whether application for judicial review unsustainable because applicant failed to identify correct decision to be challenged — Whether respondents had unjustifiably withheld from applicant the details, breakdown and calculation of constructed normal value and dumping margin — Whether respondent acted contrary to procedural fairness and natural justice when respondents withheld from applicant the details, breakdown and calculation of constructed normal value and dumping margin — Whether respondents' decision was incorrect, could not be justified and was not supported by available facts — Countervailing and Anti-Dumping Duties Act 1993 ss 25 & 30

The present judicial review application ('encl 29') was filed by the applicant to review the decision given by the respondents by way of the Notice of Affirmative Final Determination of Anti-Dumping Duty Investigation about the Imports of Steel Concrete Reinforcing Bar ('Rebar') Products, originating or exported from the Republic of Singapore and the Republic of Turkey No PU(B) 46 dated 21 January 2020 and the Final Determination Report dated 7 January 2020 in imposing anti-dumping duties at the rate of 4.97% on steel concrete reinforcing bar products that were hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant of the Republic of Singapore from 22 January 2020 to 21 January 2025. The judicial review application was made premised on the following grounds: (a) the respondents, suddenly departing from their long-established practice, had unjustifiably withheld from the applicant the details, breakdown, their computation of how normal value was constructed and their calculation of the dumping margin; (b) the actions of the respondents were in breach of The World Trade Organisation ('the WTO') law which Malaysia was subject to, and contrary to procedural fairness and natural justice; (c) the Investigation Authority had failed to act with procedural fairness and had breached natural justice by departing without prior public notification of the change from its long-standing practice of providing details, breakdown or computation of normal value and the dumping margin to exporters subject to anti-dumping duties; and (d) the respondents' recommendation/decision was incorrect and could not be justified. The respondents raised a preliminary objection ('the PO') that the application for judicial review was unsustainable

for the following reasons: (a) the wrong decision was identified as the decision to impose anti-dumping duties which was made by the Government of Malaysia by way of Notice of Affirmative Final Determination (PU(B) 46/2020) ('the first impugned decision'); (b) the Notice of Affirmative Final Determination (PU(B) 46/2020) which stated that there existed a dumping margin and an injury was not the decision of the third respondent ('the second impugned decision'); (c) the Final Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020 by the Investigation Authority amounted to a finding and not a decision in the context of judicial review application ('the second impugned decision'); and (d) the second, the fourth and the sixth respondents' were a non-legal entity that could sue and be sued.

Held, allowing encl 29 with no order as to costs:

(1) Based on s 30 of the Countervailing and Anti-Dumping Duties Act 1993 ('Act 504'), it was clear that the first respondent (the Minister of Finance) was the decision maker in this case. The Customs (Anti-Dumping Duties) Order 2020 PU(A) 22 dated 21 January 2020 had been issued by order of the Minister of Finance. Therefore, the court was of the view that the term 'government' in Act 504 essentially referred to the Minister who carried out the will of the government and that the Minister was the agent of the government. The term 'government' as referred to in s 25 of Act 504 ought to be read together with s 30 of the same Act and the fact that both decisions were made in the name of the Minister of Finance and the Minister of International Trade and Industry who were the human agencies which carry out the will of the Government of Malaysia (see paras 40–41 & 43–44).

(2) The court found that the Customs (Anti-Dumping Duties) Order 2020 PU(A) 22 dated 21 January 2020 which was a consequential decision made by the first respondent following the recommendation or proposal of the third respondent arising from the Anti-Dumping Duty Investigation had altered the obligation of the applicant as the latter was now required to pay anti-dumping duties. This decision may be subject to and amenable to judicial review. Further, the court found that the analysis and reasoning behind the decision to impose anti-dumping duties on the applicant could only be found in the Final Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020, making it necessary to be included in this application. In addition, the court was of the view that the Notice of Affirmative Final Determination was a decision of the third respondent as the said notice was signed by the third respondent. Based on the above, the court ruled that the applicant had identified the correct decision to be included in this application (see paras 46–48 & 50).

(3) It was trite law that the decision of the second, fourth and sixth respondents were amenable to judicial review. The court agreed with the applicant that the judicial review application should be allowed against the second, fourth and sixth respondents notwithstanding that they were government departments as the applicant was not suing them but rather challenging their decision. Premised on the above, the court was of the view that the PO raised by the respondents was untenable and devoid of merit and thereby dismissed (see paras 51 & 53–54).

(4) The court was of the view that the disclosure of the following data used by the Investigation Authority: (a) the determination of normal value (including constructed normal value); (b) the determination of export price; (c) the sales that were used in the comparisons between the normal value and export price; (d) any adjustments for the difference which affect price comparability; and (e) the calculation methodology applied by the Investigation Authority to determine the margin of dumping, formed part of the duty of a public decision-maker to give reason(s) for its decision even in the absence of an express provision in any statute requiring the decision-maker to give reasons as this duty existed to allow the interested party to be given a fair opportunity to correct or contradict the evidence made against him pursuant to Article 6.9 per WTO Appellate Body Report in China-HP-SSST (Japan)/China-HP-SSST (EU) WT/DS454/AB/R, para 7.91. Therefore, based on article 6 and 12 of the Anti-Dumping Agreement and the principles of natural justice, the court ruled that the respondents had unjustifiably withheld from the applicant the details, breakdown and the calculation of the constructed normal value and the dumping margin (see paras 63 & 65).

(5) The court found that the respondents had acted contrary to procedural fairness and natural justice when: (a) the Investigation Authority failed, refused and/or neglected to provide the applicant with the details, breakdown or computation on how the dumping margin was calculated; (b) the Investigation Authority failed, refused and/or neglected to provide the applicant with the details, breakdown or computation on how normal value was constructed; and (c) the Investigation Authority failed, refused and/or neglected to provide the applicant with the details, breakdown or computation on how it derived that 80.79% of the volume of sales of the like product in the domestic market was made below cost (see paras 75–76).

(6) Based on the facts, the court was of the view that the respondent's recommendation/decision was incorrect, could not be justified and was not supported by the available facts because: (a) the Investigation Authority's construction of normal value was incorrect and could not be justified; (b) there was no dumping margin for the applicant's exports of Rebar; and (c) the conclusion that the imports caused injury to the

domestic industry made by the Investigation Authority was unjustified and unsustainable as it was contrary to the Investigation Authority's own findings that there was no price suppression and that the domestic industry was able to increase its selling prices in the POID and such conclusion also contrary to articles 3.1, 3.4 and 12.2.2 of the Anti-Dumping Agreement as explained in China-X-Ray Equipment Panel Report (see para 77).

[Bahasa Malaysia summary

Permohonan semakan kehakiman semasa ('lampiran 29') telah difailkan oleh pemohon untuk menyemak keputusan yang diberikan oleh responden-responden melalui Notis Penentuan Akhir Afirmatif Penyiasatan Duti Anti-Lambakan tentang Import Produk Bar Penguat Konkrit Keluli ('Rebar'), berasal atau dieksport dari Republik Singapura dan Republik Turki No PU(B) 46 bertarikh 21 Januari 2020 dan Laporan Penentuan Akhir bertarikh 7 Januari 2020 dalam mengenakan duti anti-lambakan pada kadar 4.97% ke atas produk bar keluli pengukuh konkrit yang merupakan bar keluli bergulung panas yang mengandungi lekukan, rusuk, alur atau ubah bentuk lain yang berasal atau dieksport daripada pemohon yang berasal daripada Republik Singapura dari 22 Januari 2020 hingga 21 Januari 2025. Permohonan semakan kehakiman dibuat berdasarkan alasan-alasan berikut: (a) responden-responden secara tiba-tiba meninggalkan amalan mereka yang telah lama wujud, telah secara tidak wajar menahan daripada pemohon butiran, pecahan, pengiraan mereka tentang cara nilai normal ditentukan dan pengiraan mereka berhubung margin lambakan; (b) tindakan responden-responden adalah melanggar undang-undang Pertubuhan Perdagangan Dunia ('PBD') yang mengikat Malaysia, dan bertentangan dengan keadilan prosedur dan keadilan semula jadi; (c) Pihak Berkuasa Penyiasatan telah gagal untuk bertindak dengan keadilan prosedur dan telah melanggar keadilan semula jadi apabila menyimpang tanpa pemberitahuan awam terlebih dahulu tentang perubahan amalan lamanya dalam memberikan butiran, pecahan atau pengiraan nilai normal dan margin lambakan kepada pengeksport tertakluk kepada duti anti-lambakan; dan (d) cadangan/keputusan responden-responden adalah tidak betul dan tidak boleh dibenarkan. Responden-responden membangkitkan bantahan awal ('BA') bahawa permohonan untuk semakan kehakiman adalah tidak mampan atas sebab-sebab berikut: (a) keputusan yang salah yang telah dikenal pasti adalah keputusan untuk mengenakan duti anti-lambakan yang telah dibuat oleh Kerajaan Malaysia melalui Notis Penentuan Akhir Afirmatif (PU(B) 46/2020) ('keputusan pertama yang dipertikaikan'); (b) Notis Penentuan Akhir Afirmatif (PU(B) 46/2020) yang menyatakan bahawa wujud margin lambakan dan kemudaratan bukanlah keputusan responden ketiga ('keputusan kedua yang dipertikaikan'); (c) Laporan Penentuan Akhir Penyiasatan Duti Anti-Lambakan bertarikh 7 Januari 2020 oleh Pihak Berkuasa Penyiasatan adalah terjumlah kepada dapatan dan bukan keputusan

dalam konteks permohonan semakan kehakiman ('keputusan kedua yang dipertikaikan'); dan (d) responden kedua, keempat dan keenam adalah entiti bukan sah yang boleh mendakwa dan disaman.

Diputuskan, membenarkan lampiran 29 tanpa perintah berkaitan kos:

(1) Berdasarkan s 30 Akta Duti Timbal Balas dan Anti-Lambakan 1993 ('Akta 504'), adalah jelas bahawa responden pertama ('Menteri Kewangan') adalah pembuat keputusan dalam kes ini. Perintah Kastam (Anti-Lambakan Duti) 2020 PU(A) 22 bertarikh 21 Januari 2020 telah dikeluarkan atas perintah Menteri Kewangan. Oleh itu, mahkamah berpendapat bahawa istilah 'kerajaan' dalam Akta 504 pada asasnya merujuk kepada Menteri yang menjalankan kehendak kerajaan dan bahawa Menteri adalah ejen kerajaan. Istilah 'kerajaan' seperti yang dirujuk dalam s 25 Akta 504 hendaklah dibaca bersama dengan s 30 Akta yang sama dan hakikat bahawa kedua-dua keputusan dibuat atas nama Menteri Kewangan dan Menteri Perdagangan Antarabangsa dan Industri yang merupakan agensi-agensi manusia yang melaksanakan kehendak Kerajaan Malaysia (lihat perenggan 40–41 & 43–44).

(2) Mahkamah mendapati Perintah Kastam (Anti-Lambakan) 2020 PU(A) 22 bertarikh 21 Januari 2020 yang merupakan keputusan berbangkit yang dibuat oleh responden pertama berikutan syor atau cadangan responden ketiga yang timbul daripada Penyiasatan Duti Anti-Lambakan telah mengubah tanggungjawab pemohon kerana pemohon kini dikehendaki membayar duti anti-lambakan. Keputusan ini boleh tertakluk kepada dan boleh disemak melalui semakan kehakiman. Selanjutnya, mahkamah mendapati analisis dan alasan di sebalik keputusan mengenakan duti anti-lambakan ke atas pemohon hanya boleh didapati dalam Laporan Penentuan Akhir Siasatan Duti Anti-Lambakan bertarikh 7 Januari 2020, menjadikannya perlu dimasukkan dalam permohonan ini. Di samping itu, mahkamah berpandangan bahawa Notis Penentuan Akhir Afirmatif tersebut merupakan keputusan responden ketiga kerana notis tersebut ditandatangani oleh responden ketiga. Berdasarkan penemuan di atas, mahkamah memutuskan bahawa pemohon telah mengenal pasti keputusan yang betul untuk dimasukkan ke dalam permohonan ini (lihat perenggan 46–48 & 50).

(3) Sudah menjadi undang-undang yang mantap bahawa keputusan responden kedua, keempat dan keenam boleh disemak melalui semakan kehakiman. Mahkamah bersetuju dengan pemohon bahawa permohonan semakan kehakiman harus dibenarkan terhadap responden kedua, keempat dan keenam walaupun mereka adalah jabatan kerajaan kerana pemohon tidak menyaman mereka sebaliknya mencabar keputusan mereka. Berdasarkan penemuan di atas, mahkamah

berpendapat bahawa BA yang dibangkitkan oleh responden-responden adalah tidak boleh dipertahankan dan tiada merit dan dengan itu ditolak (lihat perenggan 51 & 53–54).

(4) Mahkamah berpendapat bahawa pendedahan data-data berikut yang digunakan oleh Pihak Berkuasa Penyiasatan: (a) penentuan nilai normal (termasuk nilai normal yang dibina); (b) penentuan harga eksport; (c) jualan yang digunakan dalam perbandingan antara nilai normal dan harga eksport; (d) apa-apa pelarasan bagi perbezaan yang menjejaskan kebolehbandingan harga; dan (e) metodologi pengiraan yang digunakan oleh Pihak Berkuasa Penyiasatan untuk menentukan margin lambakan, menjadi sebahagian daripada kewajipan pembuat keputusan awam untuk memberi alasan bagi keputusannya walaupun tanpa peruntukan nyata dalam mana-mana statut menghendaki pembuat keputusan memberi alasan kerana kewajipan ini wujud untuk membolehkan pihak yang berkepentingan diberi peluang yang adil untuk membetulkan atau menyanggah keterangan yang dibuat terhadapnya menurut Artikel 6.9 daripada Laporan Badan Rayuan PBD di China-HP-SSST (Jepun)/China-HP-SSST (EU) WT/DS454/AB/R, perenggan 7.91. Oleh itu, berdasarkan Artikel 6 dan 12 Perjanjian Anti-Lambakan dan prinsip keadilan semula jadi, mahkamah memutuskan bahawa responden-responden telah secara tidak wajar menahan daripada pemohon butiran, pecahan dan pengiraan nilai normal yang dibina dan margin lambakan (lihat perenggan 63 & 65).

(5) Mahkamah mendapati bahawa responden-responden telah bertindak bertentangan dengan keadilan prosedur dan keadilan semula jadi apabila: (a) Pihak Berkuasa Penyiasatan gagal, enggan dan/atau mengabaikan untuk memberikan pemohon butiran, pecahan atau pengiraan tentang cara margin lambakan dikira; (b) Pihak Berkuasa Penyiasatan gagal, enggan dan/atau mengabaikan untuk memberikan pemohon butiran, pecahan atau pengiraan tentang cara nilai normal dibina; dan (c) Pihak Berkuasa Penyiasatan gagal, enggan dan/atau mengabaikan untuk memberikan butiran, pecahan atau pengiraan kepada pemohon tentang bagaimana ia memperoleh dapatan bahawa 80.79% daripada jumlah jualan produk serupa di pasaran domestik dibuat di bawah kos (lihat perenggan 75–76).

(6) Berdasarkan fakta, mahkamah berpandangan bahawa syor/keputusan responden-responden adalah tidak betul, tidak berasas dan tidak disokong oleh fakta yang ada kerana: (a) pembinaan nilai normal oleh Pihak Berkuasa Penyiasatan adalah tidak berasas; (b) tiada margin lambakan untuk eksport Rebar oleh pemohon; dan (c) kesimpulan bahawa import menyebabkan kemudaratan kepada industri domestik yang dibuat oleh Pihak Berkuasa Penyiasatan adalah tidak wajar dan tidak mampan kerana ia bertentangan dengan penemuan Pihak Berkuasa

Penyiasatan sendiri bahawa tiada penindasan harga dan bahawa industri domestik dapat meningkatkan harga jualannya dalam POID dan kesimpulan sedemikian juga bertentangan dengan artikel 3.1, 3.4 dan 12.2.2 Perjanjian Anti-Lambakan seperti yang dijelaskan dalam 'China-X-Ray Equipment Panel Report' (lihat perenggan 77).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, FC (refd)

Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA)) [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436, CA (refd)

Ketua Pengarah Kastam dan Eksais v Altus Logistics Malaysia Sdn Bhd [2019] MLJU 1328; [2019] MLRHU 215, HC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, FC (refd)

Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia [2017] 6 MLJ 586; [2017] 6 MLRA 470; [2017] 10 CLJ 36, CA (refd)

Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor [2016] 2 MLJ 495; [2016] 5 MLRA 503; [2016] 5 CLJ 250, CA (refd)

Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors [2021] 3 MLJ 1; [2021] 2 MLRA 513; [2021] 2 CLJ 808, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1996] 1 MLRA 725; [1997] 1 AMR 433, FC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601, CA (refd)

Wee Toon Boon v PP [1976] 2 MLJ 191; [1976] 1 MLRH 304 (refd)

Legislation referred to

Countervailing and Anti-Dumping Duties Act 1993 ss 16(2), 25, 30, 30(4)
Countervailing and Anti-Dumping Duties Regulations 1994 reg 26
Customs (Anti-Dumping Duties) Order 2020
Customs (Provisional Anti-Dumping Duties) Order 2019
Rules of Court 2012 O 53

Lim Koon Huan (with Manshan Singh) (Skrine & Co) for the applicant.
Kogilambigal Muthusamy (Federal Counsel, Attorney General's Chambers) for the respondents.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant filed an application for judicial review ('encl 29') under O 53 of the Rules of Court 2012 ('the ROC') to seek the following reliefs:

> 1.1. That the Applicant be granted leave to apply for an order for certiorari to quash the decision of the Minister of Finance to impose anti-dumping duties at the rate of 4.97% on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from Natsteel Holdings Pte Ltd of the Republic of Singapore from 22 January 2020 to 21 January 2025 as set out in the Customs (Anti-Dumping Duties) Order 2020 PU(A) 22 dated 21 January 2020 following the recommendation or proposal of the Minister of International Trade and Industry arising from an Anti-Dumping Duty Investigation with regard to the imports of steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the Republic of Singapore and Republic of Turkey;
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> 1.2. That the Applicant be granted leave to apply for an order for certiorari to quash the decision and/or recommendation of the Minister of International Trade and Industry to impose anti-dumping duties at the rate of 4.97% on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from Natsteel Holdings Pte Ltd of the Republic of Singapore from 22 January 2020 to 21 January 2025 as set out in the Notice of Affirmative Final Determination and the Final Determination Report of an Anti-Dumping Duty Investigation with regard to the imports of steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the Republic of Singapore and the Republic of Turkey both dated 21 January 2020 and 7 January 2020 respectively;
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> 1.3. That there shall be no order as to costs; and
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> 1.4. Such further and other orders and/or directions as may be given or made as this Honourable Court deems fit and proper in the circumstances.

[2] In gist, this judicial review application is made to review the decision given by the respondents by way of the Notice of Affirmative Final Determination of Anti-Dumping Duty Investigation about the Imports of Steel Concrete Reinforcing Bar (Rebar) Products, originating or exported from the Republic of Singapore and the Republic of Turkey No PU(B) 46 dated 21 January 2020 and the Final Determination Report dated 7 January 2020 in imposing anti-dumping duties at the rate of 4.97% on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant of the Republic of Singapore from 22 January 2020 to 21 January 2025.

[3] After the hearing, I allowed the applicant's judicial review application ('encl 29'). I will now set out the grounds of my judgment.

BACKGROUND FACTS

[4] The background facts of this case are adopted with and/or without modification from the statement, affidavit in support and the written submission of the parties.

[5] Natsteel is a company incorporated under the laws of the Republic of Singapore. Its registered address is 22 Tanjong Kling Road, Singapore 628048.

[6] The company produces and supplied steel products and services to the construction industry and is the producer and exporter of steel concrete reinforcing bars to Malaysia.

[7] By a 'Petition for Anti-Dumping Duties on imports of steel concrete reinforcing bar originating or exported from the Republic of Singapore and Republic of Turkey' dated 29 March 2019, the Malaysia Steel Association ('MSA'), requested for the third and fourth respondents to initiate an anti-dumping investigation on Rebar originating or exported from the Republic of Singapore and Republic of Turkey.

(See exh 'A1' on pp 28–124 of applicant's affidavit verifying facts ('AVF')).

[8] The third respondent delegated his investigative powers to the Trade Practices Section of the fourth respondent ('investigation authority').

(See exh 'A2' on pp 125–136 of applicant's AVF).

[9] The applicant fully cooperated with the investigation authority in the anti-dumping investigation and submitted a full and complete foreign producer's/exporter's questionnaire response to the investigation authority.

(See exhs 'A3' and 'A4' on pp 137–224 of applicant's AVF).

[10] By a Notice of Affirmative Preliminary Determination of an Anti-Dumping Duty Investigation with regard to the Imports of Steel Concrete Reinforcing Bar Products Originating or Exported from the Republic of Singapore and the Republic of Turkey No PU(B) 454 dated 23 September 2019 and the Preliminary Determination Report dated 5 September 2019 ('PD Report'), the third respondent recommended/proposed to the first respondent to impose a provisional

anti-dumping duties of 5.99% on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant for 120 days from 24 September 2019.

(See exh 'A5' on pp 225–279 of applicant's AVF).

[11] Pursuant to the said recommendation/proposal, the first respondent by way of a Customs (Provisional Anti-Dumping Duties) Order 2019 No PU(A) 265 imposed a provisional anti-dumping duties of 5.99% on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant from 24 September 2019 to 21 January 2020.

(See exh 'A5' on pp 280–286 of applicant's AVF).

[12] In paras 67 and 71 of the PD Report, the investigation authority made a finding that (see exh 'A5' on pp 258–259 of applicant's AVF):

(i) the applicant's sales to all customers based on the same product codes sold to Malaysia during the Period of Investigation from 1 October 2017 to 30 September 2018 ('POI') was 70,156.31 MT valued at SGD43,482,745.73;

(ii) the applicant's volume of sales below the cost of the like product represented 80.79% of the volume sold in the domestic market throughout the POI;

(iii) due to (ii) above, the applicant's Singapore domestic sales of the product were not made in the ordinary course of trade; and

(iv) in para 71 and Annexure 1, calculated the normal value based on the constructed figure over the export price.

[13] The investigation authority then proceeded to construct the normal value under s 16(2) of the Countervailing and Anti-Dumping Duties Act 1993 (Act 504) and reg 26 of the Countervailing and Anti-Dumping Duties Regulations 1994.

[14] The applicant instructed its solicitors, Messrs Skrine to issue the letter dated 4 October 2019 to the investigation authority to request the breakdown of the calculations of the constructed normal value. In reply, by way of an email dated 7 October 2019 an officer of the fourth respondent failed, refused and/or neglected to provide the breakdown of the calculations, with a reply merely

stating that '... in determining the dumping margin, the IA examined the information provided by Natsteel'.

(See exh 'A6' on pp 287–290 of applicant's AVF).

[15] As part of the investigation process, on 11 October 2019 the applicant filed its comments to the PD Report to set out that:

(a) the calculations made by the investigation authority do not tally with the data provided by the applicant; and

(b) the applicant requested for the particulars and details of such calculations/construction and looked forward to working with the investigation authority.

[16] The applicant drew the attention of the investigation authority to the following matters (see exh 'A7' on pp 291–298 of applicant's AVF):

(a) the applicant had entered into certain fixed price contracts for Singapore domestic sales in past years. The contract prices were very low due to the prevailing contract prices at the material time they were entered and were not representative of the market prices during the POI. On this basis, the applicant requested that the exceptionally low prices be excluded from the comparison of the domestic selling price;

(b) some of the applicant's Singapore domestic sales during the POI were supplemented by imported materials and were not produced by the applicant; and

(c) since the submission of the Foreign Exporter's Questionnaire Response, additional scrap price adjustments and credits for disposal of by-products generated such as mill scaled, scraps, and dust were not captured in the monthly costing and have been updated. The investigation authority was invited to verify this when the verification visit was conducted.

[17] From 4 November 2019 to 7 November 2019, the investigation authority conducted a verification visit at the applicant's premises in Singapore and duly verified all the information submitted by the applicant in the Foreign Producer's/Exporter's Questionnaire.

(See exhs 'A8' and 'A9' on pp 394–406 of applicant's AVF).

[18] During the verification visit, the applicant had requested from the investigation authority for the breakdown and methodology on the constructed normal value and how the investigation authority derived that the applicant's volume of sales below the cost of the like product represented

80.79%. However, the investigation authority failed, refused and neglected to provide the breakdown contrary to article 12.2.1 of the Anti-Dumping Agreement.

[19] During the verification visit, the investigation authority specifically, requested and duly received all the information set out in the applicant's Foreign Producer's/Exporter's Questionnaire. The applicant further provided additional documents to assist the investigation authority.

(See exh 'A10' on pp 407–414 of applicant's AVF).

[20] At the verification visit on 7 November 2019, the applicant provided the investigation authority with the (see exh 'A11' on pp 415–416 of applicant's AVF):

(a) completed consolidation details of adjustments of public infrastructure and housing steel supply contracts with indexed-pricing using the steel-price index provided by the Building Construction Authority; and

(b) long-term-fixed-term contracts ranging from three to 30 months where the contract prices were very low and are not indicative of the market prices during the period under investigation POI.

[21] On 11 November 2019, the applicant provided the investigation authority with supporting documents and highlighted that (see exh 'A12' on pp 417–475 of applicant's AVF):

(a) the applicant had entered into fixed term contracts ranging from three to 30 months to supply the product for fixed prices based on prevailing market rates (at the time the contracts were entered into) in the Singapore domestic market. These fixed term contracts ought to be excluded as they are not 'like transactions';

(b) the applicant had provided the final unit selling price taking into account price adjustments to sale price based on credit and debit notes; and

(c) the applicant had provided revised prices to consider scrap adjustments and other credits and selling and administrative adjustments.

[22] On 23 December 2019, the investigation authority released its final disclosure in the form of a Notice of Essential Facts where the investigation authority recommended to the third respondent to propose to the first respondent to impose a final anti-dumping duties of 4.97% on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant.

(See exh 'A13' on pp 476–523 of applicant's AVF).

[23] The applicant noted that while some adjustment was made to reduce the dumping margin from 5.99% to 4.97%, the investigation authority still failed, refused and/or neglected to take into account the explanations and maintained that 80.79% of the applicant's Singapore domestic sales were below cost.

[24] Consequently, the applicant instructed its solicitors, Messrs Skrine to issue the letter dated 23 December 2019 to request for the breakdown and clarification of the calculation on how 80.79% of the volume of sales of the like product in the domestic market was made below cost. By way of an email dated 23 December 2019, an officer of the fourth respondent replied that the information was available in Section E and Appendix 1 of the Notice of Essential Facts.

(See exh 'A14' on pp 524–527 of applicant's AVF).

[25] As can be seen from Section E and Appendix 1 of the Notice of Essential Facts in exh 'A13', there is no explanation of the breakdown and methodology of the constructed normal value and how the investigation authority derived that the applicant's volume of sales below cost of the like product represented 80.79%.

[26] By its comments on the Notice of Essential Facts dated 27 December 2019, the applicant again highlighted that (see exh 'A15' on pp 528–533 of applicant's AVF):

(a) the investigation authority had completely disregarded the information provided by the applicant in response to the allegation that the sale of the subject merchandise in the Singapore domestic market was made below cost; and

(b) the investigation authority had failed to provide the minimum requirements of providing an adequate and full explanation to enable the applicant to properly respond as required by article 12.2.1 of the Anti-Dumping Agreement.

[27] By a Notice of Affirmative Final Determination of Anti-Dumping Duty Investigation about the Imports of Steel Concrete Reinforcing Bar Products originating or exported from the Republic of Singapore and the Republic of Turkey No PU(B) 46 dated 21 January 2020 and the Final Determination Report dated 7 January 2020, the third respondent recommended/proposed to the first respondent to impose a final anti-dumping duties of 4.97% on steel concrete reinforcing bar products that are hot rolled

steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant of the Republic of Singapore from 22 January 2020 to 21 January 2025.

(See exh 'A16' on pp 534–593 of applicant's AVF).

[28] Pursuant to this recommendation/proposal, the first respondent had by way of a Customs (Anti-Dumping Duties) Order 2020 PU (A) 22 dated 21 January 2020, imposed a final anti-dumping duties of 4.97% on imports of steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation originating or exported from the applicant of the Republic of Singapore from 22 January 2020 to 21 January 2025.

(See exh 'A17' on pp 594–601 of applicant's AVF).

THE LAW

[29] Judicial review is generally concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety.

[30] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[31] In the recent Federal Court case, *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537; [2018] 3 MLRA 589; [2018] 2 CLJ 513; [2018] 2 MELR 337, the liberal approach on judicial review in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147; [1996] 1 MLRA 725; [1997] 1 AMR 433 has been re-emphasised as follows:

> [45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:
>
> > It is often said that judicial review is concerned not with the decision but the decision-making process (see eg *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that *such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.*

In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

> *By 'illegality'* as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> *By 'irrationality',* I mean what can by now be succinctly referred to as 'Wednesday unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned *'proportionality'* as a possible fourth ground of review which called for development. (Emphasis added).

[32] Further, the Court of Appeal in *Dato' Seri Dr Ahmad Zahid bin Hamidi, Menteri Dalam Negeri Kementerian Dalam Negeri & Ors v Soo Lina & Ors (for and on behalf of the Sarawak Society For People's Aspiration (SAPA))* [2018] 2 MLJ 738; [2018] 1 MLRA 683; [2018] 6 CLJ 285; [2018] 1 AMR 436 explained the test of reasonableness in a judicial review as follows:

> [39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an

administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in *The State (at the Prosecution of John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal* [1986] IR 642 set a number of such circumstances in different terms. They are:

1. It is fundamentally at variance with reason and common sense;
2. It is indefensible for hearing in the teeth of plain reason and common sense; and
3. Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.

[41] In *Meadows v Minister for Justice Equlity and Law Reform and others* [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:

> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises, inter alia, from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on or rational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

[33] In addition, a decision that involves an error of law is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 1 MLRA 336; [1999] 3 CLJ 65; [1999] 3 AMR 3529, where it states:

> In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and,* we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, *'... no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.* (Emphasis added).

[34] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601 in the following words:

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law,* for the categories of such an error are not closed. *But it may be said*

that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* (Emphasis added).

[35] Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicant must show that the Industrial Court had, among others:

(a) asked itself the wrong questions;

(b) considered irrelevant matters;

(c) failed to consider relevant matters;

(d) failed to apply the proper principle(s) of law; and/or

(e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE APPLICANT'S GROUND FOR THE JUDICIAL REVIEW

[36] The applicant seeks for a judicial review on the following grounds:

(a) the respondents, suddenly departing from their long-established practice, had unjustifiably withheld from the applicant the details, breakdown, their computation of how normal value was constructed and their calculation of the dumping margin;

(b) the actions of the respondents are in breach of WTO law which Malaysia is subject to, and contrary to procedural fairness and natural justice;

(c) the investigation authority had failed to act with procedural fairness and had breached natural justice by departing without prior public notification of the change from its long-standing practice of providing details, breakdown or computation of normal value and the dumping margin to exporters subject to anti-dumping duties; and

(d) the respondents' recommendation/decision is incorrect and cannot be justified.

PRELIMINARY OBJECTION ('PO')

[37] At the outset of the hearing, the learned federal counsel ('FC') raised a PO that the reliefs sought by the applicant are unsustainable under the law and the naming of the non-legal entity.

[38] According to the learned FC, the application for judicial review is

unsustainable for the following reasons:

(a) the wrong decision is identified as the decision to impose anti-dumping duties was made by the Government of Malaysia by way of Notice of Affirmative Final Determination (PU(B) 46/2020) ('first impugned decision');

(b) the Notice of Affirmative Final Determination (PU(B) 46/2020) which stated that there exists a dumping margin and an injury is not the decision of the third respondent ('second impugned decision');

(c) the Final Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020 by the Investigation Authority amounts to a finding and not a decision in the context of judicial review application ('second impugned decision'); and

(d) the second, the fourth and the sixth respondents' are a non-legal entity that can sue and be sued.

THE DECISION OF THE COURT PRELIMINARY OBJECTION

The wrong decision is identified as the decision to impose anti-dumping duties was made by the Government of Malaysia by way of Notice of Affirmative Final Determination (PU(B) 46/2020) (first impugned decision)

[39] Section 30 of Act 504 states that:

> (3) Any finding of an investigation, whether for the purpose of a preliminary or final determination, or a review, under this Act, *shall be forwarded to the Minister.*
>
> (4) The Minister shall make a recommendation to the *Minister of Finance who shall make a determination or a decision.* (Emphasis added).

[40] Based on the above, it is clear that the first respondent is the decision maker in this case. The Customs (Anti-Dumping Duties) Order 2020 PU(A) 22 dated 21 January 2020 has been issued by order of the Minister of Finance.

(See exh 'A17' on pp 594–601 of AVF).

[41] Therefore, it is my view that the term 'government' in Act 504 essentially refers to the Minister who carries out the will of the government. Further, I view that the Minister is the agent of the government.

[42] In *Wee Toon Boon v Public Prosecutor* [1976] 2 MLJ 191; [1976] 1 MLRH 304, Wee Chong Jin CJ (as he then was) held that:

> ... In the performance of his duties as a Minister of State the appellant was clearly acting for the Government, *it being necessary for the government to exercise its functions through some human agency* and in receiving remuneration for the

performance of his duties and the discharge of his responsibilities as a Minister of State he is clearly a person serving or employed by the government and accordingly he fell within the definition of 'agent' in the Act'. (Emphasis added).

[43] Further, I find that:

(a) s 30(4) of Act 504 clearly states that 'The Minister shall make a recommendation to the Minister of Finance who shall make a determination or a decision';

(b) the Customs (Anti-Dumping Duties Order) 2020 PU(A) 22 dated 21 January 2020 ('MOF decision') is issued in the name of the Minister of Finance; and

(c) the Notice of Affirmative Final Determination PU(B) 46 and the Final Determination Report of an Anti-Dumping Duty Investigation dated 21 January 2020 and 7 January 2020 respectively ('MITI decision') are issued in the name of the Minister of International Trade and Industry.

[44] In my judgment, the term 'government' as referred to in s 25 of Act 504 ought to be read together with s 30 of the same Act and the fact that both decisions are made in the name of the Minister of Finance and the Minister of MITI who are the human agencies which carry out the Government of Malaysia will.

The applicant has failed to identify the correct decision

[45] The first respondent pursuant to s 30(4) of Act 504 has the ultimate-decision making power. The decision of the first respondent to impose anti-dumping duties against the applicant was implemented through the Customs (Anti-Dumping Duties) Order 2020 PU(A) 22 dated 21 January 2020 as evidenced by the first respondent's signature on the said order on p 601 of the AVF.

[46] In this case, the Customs (Anti-Dumping Duties) Order 2020 PU(A) 22 dated 21 January 2020, is a consequential decision made by the first respondent following the recommendation or proposal of the third respondent arising from the Anti-Dumping Duty Investigation had altered the obligation of the applicant as the latter is now required to pay anti-dumping duties. This decision may be subject to and amenable to judicial review.

[47] Further, I find that the analysis and reasoning behind the decision to impose anti-dumping duties on the applicant can only be found in the Final

Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020, making it necessary to be included in this application.

[48] Based on the above, I am of the view that the applicant has identified the correct decision to be included in this application.

Notice of Affirmative Final Determination is not a decision of the third respondent

[49] The respondent submits that the Notice of Affirmative Final Determination is the decision of the Government of Malaysia.

[50] On this issue, I find that the Notice of Affirmative Final Determination is a decision of the third respondent as the said notice was signed by the third respondent as evidenced from p 541 of the AVF.

The second, fourth and sixth respondents' are a non-legal entity that can sue and be sued

[51] It is trite law that the decision of the second, fourth and sixth respondents are amenable to judicial review.

[52] In the case of *Ketua Pengarah Kastam dan Eksais v Altus Logistics Malaysia Sdn Bhd* [2019] MLJU 1328; [2019] MLRHU 215 Azizah Nawawi J (now JCA) held as follows:

> [13] In the first place, this is not a suit against the GST Tribunal, but an appeal from the decision of the GST Tribunal, so the cases relied by the appellant are not relevant. It is trite law that no suit lies against government departments as the same has no legal entity. *However, the GST Tribunal here is not being sued, but its decision is being challenged by the appellant.* (Emphasis added).

[53] Based on the above, I agree with the learned counsel for the applicant that the judicial review application should be allowed against the second, fourth and sixth respondents notwithstanding that they are government departments as the applicant is not suing them but rather challenging their decision.

[54] Premised on the above, I am of the view that the PO raised by the respondents is untenable and devoid of merit and is hereby dismissed.

[55] I shall now proceed to deal with the merit of the case.

The respondents suddenly departing from their long-established practice, had unjustifiably withheld from the applicant the details, breakdown, their computation of how normal value was constructed and their calculation of the dumping margin

The actions of the respondents are in breach of WTO law which Malaysia is subject to, and contrary to procedural fairness and natural justice

[56] In the instant case, I noticed that despite numerous requests made by the applicant to the investigation authority for the breakdown and methodology on the constructed normal value and how the investigation authority derived that the applicant's volume of sales below the cost of the like product represented 80.79%, the investigation authority had failed to supply the same, departing from their long-standing practice of providing the breakdown to exporters who participated in an anti-dumping investigation. (See exh 'A6' and 'A14' on pp 287–290 and 524–527 of AVF respectively).

[57] Further, I find that the investigation authority merely provided the dumping margin but failed to provide the data used in:

(a) the determination of normal value (including constructed normal value);

(b) the determination of export price;

(c) the sales that were used in the comparisons between normal value and export price;

(d) any adjustments for the difference which affect price comparability; and

(e) the calculation methodology applied by the investigation authority to determine the margin of dumping,

in contravention of the Anti-Dumping Agreement, principles of natural justice and the investigation authority's long-standing practice of providing the breakdown, their calculation of normal value and dumping margin to exporters who participate in an anti-dumping investigation which was admitted by the respondents in para 34.1 of the respondents' affidavit in reply ('AIR').

[58] Reference is made to article 12 of the Anti-Dumping Agreement which provides for the fundamental right for the applicant to be provided with the detailed dumping margin calculation as follows:

> 12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. *Each such notice shall set forth, or otherwise make available*

through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) *the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;*

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

12.2.2 *A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.* (Emphasis added).

[59] This duty is further reinforced in article 6.9 of the Anti-Dumping Agreement which reads as follows:

6.9 The authorities shall, before a final determination is made, *inform all interested parties of the essential facts under consideration* which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests. (Emphasis added).

[60] Further, I find that several WTO cases have decided that the data used in:

(a) the determination of normal value (including constructed normal value);

(b) the determination of export price;

(c) the sales that were used in the comparisons between normal value and export price;

(d) any adjustments for the difference which affect price comparability; and

(e) the formulas that were applied to the data,

have to be disclosed as these are essential facts under article 6.9 of the Anti-Dumping Agreement.

[61] In the case of WTO Panel Report in China-Broiler Products (article 21.5 — US) WT/DS427/R, the Panel held that it was essential for the investigation authority to disclose the methodology and data that formed the basis for the calculation of the margin of dumping. The Panel held as follows:

> 7.91 Bearing in mind the requirements of Article 2, we find that in the context of the determination of dumping, *the essential facts which must be disclosed include the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability. Such data form the basis for the calculation of the margin of dumping, and the margin established cannot be understood without such data.* Furthermore, the comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made, would also have to be disclosed. In our view, a proper disclosure of the comparison would require not only identification of the home market and export sales being used, but also the formula being applied to compare them. *What formula was applied is an essential element of a comparison of normal value to export price and is just as fundamental to an understanding of the establishment of the margin of dumping as the data reflecting the individual sales.* The disclosure of the formulas applied is necessary to enable the respondent to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts. *Without these formulas, a respondent would have an insufficient understanding of what the authority has done with its information and how that information was being used to determine the dumping margin.*
>
> 7.92 The Panel is aware that the panel in China-X-Ray Equipment, when faced with a similar claim from the European Union, did not consider that the 'actual mathematical determination' by which an investigating authority calculates a respondent's margin of dumping constitutes a 'fact ...under consideration', but rather that the mathematical determination is part of the 'consideration' of those facts. We note that in that case the European Union argued that the essential facts comprise the calculations as well as the data and adjustments underlying the calculations. *To the extent that the panel in China-X-Ray Equipment's reference to the 'actual mathematical determination' was to the calculations themselves (including any*

files or spreadsheets created during the calculations), we agree that these are not 'essential facts' that must be disclosed. However, if the holding of the panel in China-X-Ray Equipment were to stand for the premise that the investigating authority does not have to disclose the formula used to make the calculations, as explained above, we respectfully disagree.

7.93 *In sum, with respect to a determination of the existence and margin of dumping, pursuant to Article 6.9, the investigating authority must disclose what data was used in: (i) the determination of normal value (including constructed normal value); (ii) the determination of export price; (iii) the sales that were used in the comparisons between normal value and export price; (iv) any adjustments for difference which affect price comparability; and (v) the formulas that were applied to the data.* (Emphasis added).

[62] Similarly, in the case of WTO Appellate Body Report in China-HP-SSST (Japan)/China-HP-SSST (EU) WT/DS454/AB/R, the Appellate Body held that an investigating authority is expected, with respect to the determination of dumping to disclose, inter alia, the calculation methodology applied by the investigating authority to determine the margin of clumping. The Appellate Body held as follows:

5.130. Essential facts are, therefore, 'those that are salient for a decision to apply definitive measures. As well as those that are salient for a contrary outcome'. In order to apply a definitive measure, an investigating authority must find dumping, injury to the domestic industry, and a casual link between the dumping and the injury. These findings, in turn, are based on various intermediate findings and conclusions reached by the investigating authority. Whether a particular fact is essential or 'significant in the process of reaching a decision' depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties. An investigating authority must disclose such facts 'in a coherent way' that permits an interested party to understand the factual basis for each of the intermediate findings and conclusions reached by the authority, such that it is able properly to defend its interests.

5.131. *Thus, an investigating authority is expected, with respect to the determination of dumping, to disclose, inter alia, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping.* The mere fact that the investigating authority refers in its disclosure to data that are in the possession of an interested party does not mean that the investigating authority has disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts. Thus, while Article 6.9 does not prescribe a particular form for the disclosure of the essential facts, it does require in all cases that the investigating authority disclose those facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping. (Emphasis added).

[63] It is my considered view that the disclosure of the following data used by the investigation authority:

(a) the determination of normal value (including constructed normal value);

(b) the determination of export price;

(c) the sales that were used in the comparisons between normal value and export price;

(d) any adjustments for the difference which affect price comparability; and

(e) the calculation methodology applied by the investigation authority to determine the margin of dumping,

forms part of the duty of a public decision-maker to give reason(s) for its decision even in the absence of an express provision in any statute requiring the decision-maker to give reasons as this duty exists to allow the interested party to be given a fair opportunity to correct or contradict the evidence made against him pursuant to article 6.9 per WTO Appellate Body Report in China-HP-SSST (Japan)/China-HP-SSST (EU) WT/DS454/AB/R, para 7.91, which is set out in para 61 above. This position of law is similarly set out in the following local case law.

[64] In the Court of Appeal case of *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 MLRA 503; [2016] 5 CLJ 250, it was held:

> [45] As such, the principle as stipulated in the *Sri Lempah Enterprise*'s case is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist (see for instance: *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Another* [1958] 1 All ER 625). *In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes.* We find that every decision, both good and bad, is driven to such conclusion by a reason. The learned Justice Zainun JCA (as she then was) in the case of *Datuk Justine Jinggut v Pendaftar Pertubuhan* [2012] 3 MLJ 212 had said this:
>
> > *Thus, if no reason is given by the respondent, it is open for this court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.*

The court further held as follows:

> [49] Learned counsel for the respondent had also submitted that there was no duty expressly provided in the NLC for the SA to give or assign any reason(s) for deciding

> the way it deems fit. The case of *Minister of Labour, Malaysia v Sanjiv Oberoi & Anor* [1990] 1 MLJ 112; [1990] 1 CLJ Rep 200 was cited in support. But, we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty, from assigning any reason for his decision. Indeed, it would be most strange, if there was one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owing up to responsibility in decision-making. *As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean that there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty.* That scenario would indeed be a contradiction in terms. The proper view, as stipulated by the Apex court in the *Sugumar*'s case is to be preferred in that whether a reason need to be given by a decision-maker, is to be determined on a case by case basis. (Emphasis added).

(See *Perbadanan Pengurusan Trellises & Ors v Datuk Bandar Kuala Lumpur & Ors* [2021] 3 MLJ 1; [2021] 2 MLRA 513; [2021] 2 CLJ 808, *Mohamad Hassan bin Zakaria v Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 6 MLRA 470; [2017] 10 CLJ 36).

[65] Therefore, based on the above, pursuant to articles 6 and 12 of the Anti-Dumping Agreement and principles of natural justice, I am of the considered view that the respondents unjustifiably withheld from the applicant the details, breakdown and the calculation of the constructed normal value and the dumping margin.

The investigation authority had failed to act with procedural fairness and had breached natural justice by departing without prior public notification of the change from its long-standing practice of providing details, breakdown or computation of normal value and the dumping margin to exporters subject to anti-dumping duties

[66] On this issue, I find that previously in all anti-dumping investigations undertaken by the third and fourth respondents in line with Act 504, the investigation authority had provided the breakdown and methodology of calculations, in particular the constructed normal value and the dumping margin were derived such that the applicant had a legitimate expectation to also being provided by the investigation authority with its calculation of the constructed normal value and dumping margin of the applicant.

[67] I find that on 23 September 2019, suddenly and arbitrarily, the investigation authority decided to stop providing the 'Calculation of Dumping Margin' sheet to the applicant in the Rebar AD Investigation.

A **[68]** No explanation was then provided by the investigation authority on why the 'Calculation of Dumping Margin' was not provided to the applicant when the investigation authority's long-standing practice was to provide the 'Calculation of Dumping Margin' to exporters subject to anti-dumping duties.

B **[69]** The first time an explanation was provided was over a year later in the respondents' AIR in which the respondents relied upon the decision of the China-X-Ray Equipment Panel Report to justify not providing the 'Calculation of Dumping Margin' to the applicant.

C **[70]** However, I find that the decision of the China-X-Ray Equipment Panel Report was in 2013 and that this is not a valid justification as the investigation authority had always provided its Calculation of Dumping Margin for anti-dumping investigations to exporters subject to anti-dumping duties from
D 2013 to 2019 despite the decision of China-X-Ray Equipment Panel Report.

[71] I view that the respondent's reliance on the China-X-Ray Equipment Panel Report in this judicial review application as merely an afterthought and is not a valid justification.

E **[72]** Upon perusal of the cause papers, I find that the investigation authority had not given any credible and satisfactory explanation on their sudden departure from their long-standing practice, which was admitted by the
F respondents in para 34.1 of the respondents' AIR, to provide a computation of the dumping margin to exporters which have participated in an anti-dumping duty investigation.

[73] The respondents had merely stated that they have a discretion on
G whether to provide the computation of the dumping margin to exporters who have participated in an anti-dumping investigation.

[74] However, in light of their long-standing practice of providing details, breakdown or computation of normal value and the dumping margin to
H exporters subject to anti-dumping duties, I am of the considered opinion that the respondent's position is misconceived based on principles of natural justice.

[75] It is my considered findings that the respondents had acted contrary to
I procedural fairness and natural justice when:

(a) the investigation authority failed, refused and/or neglected to provide the applicant with the details, breakdown or computation on how the dumping margin was calculated;

(b) the investigation authority failed, refused and/or neglected to provide the applicant with the details, breakdown or computation on how normal value was constructed; and

(c) the investigation authority failed, refused and/or neglected to provide the applicant with the details, breakdown or computation on how it derived that 80.79% of the volume of sales of the like product in the domestic market was made below cost.

[76] Based on the above, in my judgment the investigation authority's repeated refusal to provide its computation of dumping margin has denied the applicant its right to a fair opportunity to correct or defends its interest which is contrary to the position of law.

The respondent's recommendation/decision is incorrect and cannot be justified

[77] Upon perusal of the facts presented before this court, I am of the considered view that the respondent's recommendation/decision is incorrect, cannot be justified and is not supported by the available facts as:

(a) the investigation authority's construction of normal value is incorrect and cannot be justified;

(b) there was no dumping margin for the applicant's exports of Rebar; and

(c) the conclusion that imports caused injury to the domestic industry made by the investigation authority is unjustified and unsustainable as it is contrary to the investigation authority's own findings that there was no price suppression and that the domestic industry was able to increase its selling prices in the POID with the such conclusion being contrary to articles 3.1, 3.4 and 12.2.2 of the Anti-Dumping Agreement as explained in China-X-Ray Equipment Panel Report.

The investigation authority's construction of normal value is incorrect and cannot be justified

[78] I find that the investigation authority's construction of normal value is incorrect and cannot be justified as:

(a) an unrealistically high profit margin of 4.75% when gross profit margins of commodity steel products such as the products under investigation ('POI') are only between 3% to 4%; and

(b) selling, general and administrative ('SG&A') expenses in their gross profit margin computation.

[79] Further, I noticed that the investigation authority had completely disregarded the information provided by the applicant in response to the allegation that the sale of the subject merchandise in the Singapore domestic market was made below cost.

[80] I view that the inclusion of the sale data on the applicant's low-price steel products in long-term, fixed-priced contracts is contrary to article 2.2 of the Anti-Dumping Agreement as they do not represent a comparison between 'like product(s)'.

There was no dumping margin for the applicant's exports of Rebar

[81] On this issue, I find that based on the applicant's calculations on how the investigation authority arrived at the dumping margin, the investigation authority had incorrectly included SG&A in their gross margin computation; which is a double-counting of SG&A as SG&A already forms part of the applicant's cost-to-make-sell ('CTMS').

[82] Based on the applicant's calculations taking into consideration the correct computation of gross profit margin without SG&A and with normal profit margin, there is no dumping by the applicant.

(See exh 'A18' on pp 602–603 of AVF).

The conclusion that imports caused injury to the domestic industry made by the investigation authority is unjustified and unsustainable as it is contrary to the investigation authority's own findings that there was no price suppression and that the domestic industry was able to increase their selling prices in the POID with the such conclusion being contrary to articles 3.1, 3.4 and 12.2.2 of the Anti-Dumping Agreement as explained in China-X-Ray Equipment Panel Report

[83] I find that the investigation authority's findings of injury cannot be supported as they are plainly contradictory and inconsistent with the findings of injury in safeguard investigation SG 02/2016 in the Final Determination Report dated 14 April 2017.

[84] The investigation authority's conclusions that imports caused injury to the Domestic Industry due to price suppression in para 190(i) of the FD Report is unjustified given the investigation authority's own findings of facts of reduced imports in the POI, that there was no price suppression of the domestic industry selling prices and the investigation authority's observation of the increasing tendency in sales turnover throughout the POD was contributed by the increasing trend of Domestic Industry's average selling price such that

there is no basis whatsoever for the imposition of anti-dumping duties on the applicant's steel concrete reinforcing bar exports to Malaysia.

[85] Further, I find that the investigation authority had incorrectly included SG&A in their gross margin computation which is a double-counting of the SG&A as the SG&A already forms part of the applicant's CTMS.

[86] In the instant case, the applicant had provided its own calculation to demonstrate that there is no dumping margin in paras 40 to 41 of the applicant's AVF which has been objectively substantiated by the recent independent and objective verification by ADC in refunding to the applicant's customers in Australia the 3% anti-dumping duty which they paid on the applicant's rebar exports to Australia after assessing and verifying the applicant's price-based normal value with mostly negative dumping margins and with a negligible dumping margin for the period between 19 May 2017 to 18 November 2018.

[87] Therefore, it is my view that if the respondents' disagree with the applicant's calculation and is insisting on their method of calculation, it is then prudent for them to provide their calculation sheet to provide clarity to the situation.

[88] I find that the respondent's contention that their calculation is correct is a bare allegation as they failed to support the same with the actual computation and calculation. To me, a mere allegation not supported by evidence is not sufficient to establish an alleged fact.

CONCLUSION

[89] Premised on the aforesaid reasons, I am of the considered view that the respondent's failure to provide details, breakdown and computation of how normal value was constructed and their calculation of the dumping margin contrary to their duty to disclose the same under the WTO and Malaysian legislation and case law.

[90] The respondents had failed to explain the sudden departure of their long-standing practice which is still observed by other jurisdictions such as Australia as required under the WTO laws.

[91] Based on the aforesaid reasons, it is clear that the applicant has established valid grounds for this judicial review.

[92] As such, I allowed the applicant's judicial review application ('encl 29') with no order as to costs.

Enclosure 29 allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar